



**BEFORE THE  
U.S. COPYRIGHT OFFICE**

**Section 1201 Study**

**Docket No. 2015-8**

**REPLY COMMENTS OF THE COPYRIGHT ALLIANCE**

The Copyright Alliance<sup>1</sup> welcomes this opportunity to respond to comments filed with the U.S. Copyright Office regarding its ongoing study of Section 1201.<sup>2</sup>

**1. Introduction**

As we have discussed in each step of this process, Section 1201 plays a vital role in facilitating a marketplace for digital works and ensuring that digital content is adequately protected from copyright infringement.<sup>3</sup> Some of the comments provide recommendations and interpretations of the law that seek to undermine the goals of Section 1201—and the critical role it plays within the broader scope of copyright—by seeking to broaden the scope of exemptions. We caution the Copyright Office against any changes that would weaken this framework and diminish the protections afforded to—and subsequently the market for—digital content.

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<sup>1</sup> The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

<sup>2</sup> Section 1201 Study: Request for Additional Comments, 81 Fed. Reg. 66,296 (Sept. 27, 2016).

<sup>3</sup> See Copyright Alliance Initial Comments; Copyright Alliance Reply Comments; Copyright Alliance Additional Comments.

## 2. Proposals for New Permanent Exemptions

The record as established through both comment periods as well as the public roundtables fails to show that statutory adjustments to Section 1201 or the rulemaking process are warranted. Rather than provide evidence, those in support of establishing new permanent exemptions rely entirely on speculation. For example, in its comments, the Electronic Frontier Foundation (“EFF”) argues in support of a permanent exemption for repair of computer programs, stating generally that, manufacturers have used Section 1201 to block competition “since its inception”—providing no supporting examples—and that users should be permitted to gain access to software “to which they have entrusted their privacy and safety.”<sup>4</sup> However, they fail to provide evidence that failure to make this a *permanent* exemption is likely to adversely impact non-infringing uses. Additionally, in mentioning safety concerns EFF highlights one of the primary reasons why such an exemption should *not* be granted. As technology continues to advance, the right to repair will present new safety concerns. BSA, in its comments, used the ongoing development of self-driving vehicles as an example which highlights the critical importance of a periodic review of these exemptions under the rulemaking process.<sup>5</sup> Given the lack of evidentiary support, it is both inappropriate and unwarranted to consider making any changes to the statute.

Several proponents of new exemptions argue in support of permanent exemptions because they would prefer to avoid the triennial rulemaking process, which they characterize as burdensome and inconvenient. This argument demonstrates a fundamental misunderstanding of the relationship between Section 1201 and the rulemaking process. Congress intended for the restrictions outlined in 1201(a)(1) to apply broadly to all classes of work<sup>6</sup> except those granted an exemption through the rulemaking process. That process was designed to act as a “fail-safe” mechanism, through which the market factors are considered and the interests of the public can be weighed against those of copyright owners in determining whether an exemption is warranted.<sup>7</sup> To argue for permanent exemptions simply because the rulemaking process is inconvenient is an attempt to undermine the statute by shielding exemptions from this fail-safe review and shifting the burden onto those with no objection to the statute as written by Congress. The triennial rulemaking allows exemptions to account for shifts in technologies, business models and non-infringing and infringing uses. To the extent the process is burdensome, the Copyright Office can tweak the process in ways that do not require legislative changes.<sup>8</sup>

## 3. Proposed Amendments to Existing Permanent Exemptions

As we’ve previously stated, “[t]he existing permanent exemptions were heavily negotiated complex provisions that are the result of balancing of many competing interests and

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<sup>4</sup> EFF Additional Comments at 4.

<sup>5</sup> BSA Additional Comments.

<sup>6</sup> H.R. REP. NO. 105-551, pt. 2, at 37 (1998).

<sup>7</sup> *Id.* at 36 (“This [fail-safe] mechanism would monitor developments in the marketplace for copyrighted materials, and allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.”).

<sup>8</sup> Copyright Alliance Initial Comments.

compromise; proposals to amend them should not be made without sufficient evidence or not without all interested parties being consulted in a similarly intensive consensus-driven process.”<sup>9</sup> Again, the record is void of evidentiary support sufficient to warrant amending these statutory exemptions, and to amend the statute without these requisite negotiations would be inappropriate and premature. Further, proponents’ suggestion that the permanent exemptions be broadened to cover a greater range of devices and activities is another attempt at using exemptions to eviscerate Section 1201.

#### **4. Anti-Trafficking Provisions**

The previous rounds of comments have not provided sufficient arguments in support of the Copyright Office altering its established interpretation of the anti-trafficking provisions in 1201(a)(2) and 1201(b). We ask the Copyright Office to confirm its interpretation of these provisions.

#### **5. Conclusion**

We appreciate the opportunity to provide comments to assist in the Copyright Office’s study of Section 1201. Please let us know if we can provide any additional information regarding our views in this submission.

Respectfully submitted,

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<sup>9</sup> Copyright Alliance Additional Comments at 2-3.